Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1537

ALAN D. EISENBERG and SYDNEY M. EISENBERG,
Petitioners,

v.

STATE OF WISCONSIN,
Respondent.

PETITIONERS' REPLY BRIEF

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THE CAMPUS PRINTING CO.

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I. THE STATE'S CONTENTION THAT *EISENBERG v. BOARDMAN* IS *RES JUDICATA* AS TO PETITIONERS' CHALLENGE TO THE CONSTITUTIONALITY OF THE CONDUCT STANDARDS APPLIED AGAINST THEM MISSES THE MARK.

Eisenberg v. Boardman, 302 F. Supp. 1360 (1969), forecloses the State of Wisconsin from punishing the petitioners herein, Sydney and Alan Eisenberg, for the very reasons found by the Wisconsin Supreme Court to support its disciplinary order. Yet, incredibly, the State, in opposition to the Eisenbergs' petition for writ of certiorari, argues that *Eisenberg v. Boardman* is *res judicata* as to the Eisenbergs' and their challenge to the constitutionality of sec. 256.29(1), WIS. STAT. Brief of Respondent in Opposition to Petition for Writ of Certiorari at 5. But the State does not consider that *Eisenberg v. Boardman* is *res judicata* as to the State, for it contends that it may punish the Eisenbergs for the very reasons which the

United States Ditsrict Court said would not support disciplinary action. Compare Brief of Respondent in Opposition to Petition for Writ of Certiorari at 7, 12 with *Eisenberg v. Boardman*, 302 F. Supp. at 1364. And the Wisconsin Supreme Court did not follow the holding of *Eisenberg v. Boardman* in punishing the Eisenbergs. (App. 219.) The State's contention that *Eisenberg v. Boardman* is *res judicata* as to petitioners' is inappropriate—it is applied against the wrong party.

II. THE STATE'S CONTENTION THAT *STATE v. PRESTON* SUPPORTS THE STATE COURT'S ACTION IN THIS CASE IS WIHOUT MERIT.

The State argues that *State v. Preston*, 38 Wis. (2d) 582, 159 N.W. (2d) 684 (1968), and the judicial history in Wisconsin, supports the action of the Wisconsin Supreme Court in setting aside the trial referee's findings of fact which had exonerated the Eisenbergs. Brief of Respondent in Opposition to Petition for Writ of Certiorari at 10-12. Neither *State v. Preston*, nor any other disciplinary decision by the Wisconsin Court which counsel has found, supports the State's contention. In *Preston*, as in other disciplinary cases, the factual findings of the referee were followed and it was only on the issue of what range of punishment ought to be imposed that the Court rejected the referee's recommendations. The Wisconsin Court has never, in any case that counsel has found, set aside the referee's factual findings, and found the defendants guilty, as it did in this case.

III. THE STATE'S RELIANCE ON THE TESTIMONY OF THE WITNESSES SET FORTH IN ITS BRIEF IS MISPLACED SINCE THE TRIAL REFEREE RESOLVED CREDIBILITY QUESTIONS IN FAVOR OF THE DEFENSE.

The State discusses at some length the testimony of numerous witnesses called by it in the disciplinary proceedings before

the trial referee to support its contentions. Brief of Respondent in Opposition to Petition for Writ of Certiorari at 13-19. Many of the witnesses who testified on behalf of the State were shown to have a substantial bias or motive and interest in the outcome of the proceedings. The principal witnesses relied upon by the State were found by the trial referee, after a full and lengthy trial, to be unworthy of belief. (App. 125-128, 146-147.) Indeed, the State's key witness, Attorney Edward Cameron, was found by the referee not to have told the truth (App. 146-147) notwithstanding a substantial offer of proof tendered by the State in an attempt to show he had a reputation for truthfulness (Tr. 3923).

IV. THE STATE'S BRIEF CONTAINS SERIOUS FACTUAL MISSTATEMENTS.

For example, none of the factual assertions characterized by the State as having been "found" by the Wisconsin Supreme Court, Brief in Opposition to Petition for Writ of Certiorari at 13-14, were in fact findings of the Wisconsin Court. The Wisconsin Court set forth its six findings at *State v. Eisenberg*, 48 Wis. (2d) 364, 379, 180 N.W. (2d) 529 (1970). The factual assertions wrongly characterized by the State as having been "found" by the Court were merely the Court's statement of testimony elicited by the State, which, the Court noted, were in "sharp conflict" with the defense version of the facts. *State v. Eisenberg*, 48 Wis. (2d) at 372-376, 180 N.W. (2d) 529.

Respectfully submitted,

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